SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
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October Term, 1971

No. .....

71-772

ANTHONY D. MENNA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Anthony D. Menna respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming the judgment of conviction of the United States District Court for the Southern District of California, by which judgment of conviction petitioner was sentenced to one year and one day in Federal custody.

Opinion Below.

Trial was had in the United States District Court for the Southern District of California at San Diego, California. The trial was by jury.

The United States Court of Appeals for the Ninth Circuit affirmed the judgment of conviction of the United States District Court for the Southern District of California by written opinion, which opinion is set forth herein in full as Appendix A.

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the decision affirming the judgment of conviction sought to be reviewed is November 11, 1971. The time of entry of judgment is November 12, 1971.

2. The statutory provision which confers jurisdiction upon this court to review the judgment of the Ninth Circuit Court of Appeals by petition for writ of certiorari is 28 U.S.C. 1254(1); 28 U.S.C.A. 1254(1).

Questions Presented for Review.

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THIS HONORABLE COURT HAS ALREADY GRANTED A WRIT OF CERTIORARI IN A CASE INVOLVING AN ALMOST IDENTICAL ISSUE RAISED IN THE CASE AT BAR, SAID ISSUE BEING WHETHER IN A FIREARMS CRIMINAL PROSECUTION BROUGHT PURSUANT TO 18 U.S.C. 922 (a)(6), THE GOVERNMENT MUST OFFER PROOF THAT THE FIREARMS MOVED IN INTERSTATE COMMERCE.

II.

WHERE A TRIAL JUDGE DELIBERATELY WITHHOLDS VITAL INFORMATION FROM DEFENSE COUNSEL AND THEREBY OBTAINS DEFENSE COUNSEL'S CONSENT TO PERMIT THE JURY TO SEPARATE OVERNIGHT DURING DELIBERATIONS, IS DEFENSE COUNSEL'S CONSENT THEREBY OBTAINED VITIATED AND IS PETITIONER ALSO THEREBY DEPRIVED OF

EFFECTIVE COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

III.

THE GIVING OF AN "ALLEN" TYPE INSTRUCTION TO THE JURY BY THE TRIAL JUDGE WAS COERCIVE OF THE JURY PER SE AND DEPRIVED PETITIONER OF A FAIR TRIAL.

Constitutional Provisions and Statutes Involved.

Sixth Amendment to the United States Constitution.

Article I, Section 8, United States Constitution.

18 U.S.C. 922 (a)(6).

18 U.S.C. 922 (h).

18 U.S.C. App. (sup. V) §1202 (a).

Statement of the Case.

On July 28, 1970, petitioner was indicted by the Grand Jury for the Southern District of California on four counts, charging petitioner with having acquired firearms by making material false statements likely to deceive the firearms seller in violation of 18 U.S.C. 922(a)(6).

The case was tried to a jury before the Honorable Thomas F. Murphy in the United States District Court for the Southern District of California, at San Diego. The trial commenced on February 16, 1971 and concluded February 18, 1971.

Petitioner was found not guilty on counts one and two, guilty on count three and the jury deadlocked on count four.

Written motion for new trial was filed and denied on April 1, 1971.

Petitioner was sentenced on April 1, 1971 to serve a term of incarceration in a Federal correctional institution for one year and one day.

Petitioner appealed from said conviction on count three to the United States Court of Appeals for the Ninth Circuit. On November 11, 1971, the Ninth Circuit Court of Appeals filed its written opinion (attached hereto and incorporated as Appendix A), which decision was entered on November 12, 1971.

It is from the written decision of the Ninth Circuit Court of Appeals affirming judgment of conviction on count three that Petitioner does seek this writ.

Statement of Facts.

Petitioner includes herein a brief summary of the factual evidence taken at the trial because with regard to issues presented herein, it is important to note that the case was a close one factually. The jury acquitted on counts one and two, found guilty on count three and hung on count four. For that reason it is felt necessary to briefly state the evidence taken.

With reference to count three, the evidence was substantially as follows:

Witness Timothy A. Payne was called by the prosecution and testified [Rep. Tr. pp. 48-61] that he had been employed as a salesman at White Front Stores in San Diego for two years; that on December 19, 1969 he sold a Marlin 30-30 rifle to defendant [Rep. Tr. pp. 48-51]; that the procedure he utilized in making sales was to obtain the customer's drivers license, fill out an

invoice and obtain customer's signature on a "Firearms Transaction Form" [Ex. 7], and then have the customer read the form; and on that date he pointed out the paragraph above the defendant's signature and asked the defendant to read it [Rep. Tr. p. 51]; the paragraph was read by the prosecutor in open court as follows [Rep. Tr. p. 52, lines 7-9]:

> "I certify that: (1) I'm neither under indictment for, nor have I been convicted of a crime punishable by imprisonment for a term exceeding one year . . ."

On cross-examination Mr. Payne admitted that his testimony concerned only what he usually did in making sales and that he has no particular remembrance of the instant transaction [Rep. Tr. p. 54, lines 17-23].

On re-direct examination the witness Payne stated he could not recall deviating from his usual practice [Rep. Tr. p. 60, lines 15-19].

It is interesting to note in passing that the witness never testified that defendant actually read or appeared to read the pertinent paragraph.

With reference to the remaining counts (counts one, two and four) the evidence presented was quite similar. In each instance the salesman testified that he sold a firearm to the defendant and that the salesman pointed out the pertinent certification paragraph on the "Firearms Transaction Record" Form 4473.

On count one witness Roger Duval testified as to the defendant's purchase of a Remington Shotgun on August 20, 1969, at the White Front Store in San Diego [Rep. Tr. pp. 8-12] utilizing Form 4473 [Ex. 1].

With reference to count two, a witness Michael Troussell, testified that he sold an M-1 carbine on December 14, 1969 at the White Front Store in San Diego to the defendant and testified concerning Exhibit 5, the "Firearms Transaction Record" [Rep. Tr. pp. 30-48].

With regard to count four, witness Frank Nauta testified that he sold a 3 caliber M-1 carbine to the defendant on March 12, 1970 at the Fed Mart Store, utilizing Exhibit 9, a "Firearms Transaction Record" form [Rep. Tr. pp. 61-70].

It should be noted that Exhibit 1 was an "old" Form 4473, in that the certification statements, above the recipient's signature, with regard to prior convictions was:

> "I certify that I am not prohibited by the provisions of Chapter 44, Title 18 U.S. Code, Title 7 of the Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-350 as amended, 18 U.S.C.) from receiving a firearm in interstate or foreign commerce."

The Form 4473 involved in counts two, three and four [Exs. 5, 7 and 9] were revised forms in which the certification paragraph was as follows:

> "I certify that: (1) I am neither under indictment for, nor have I been convicted of a crime punishable by imprisonment for a term exceeding one year. (2) I am not a fugitive from justice. (3) I am not an unlawful user of, or addicted to marihuana, or depressants, stimulants or narcotic drugs. (4) I have not been adjudicated a mental defective and I have never been committed to a state mental institution. (5) I have not been discharged from the armed forces under dishonorable

conditions. (6) I am not an alien illegally in the United States and (7) I am not a person who having been a citizen has renounced his citizenship."

At pages 76-77 of the Reporter's Transcript it was stipulated by and between counsel and received by the Court in evidence, that defendant had been convicted of a felony on June 14, 1961 in Ohio.

The Petitioner testified [Rep. Tr. pp. 81-144] that he did read the certification in Exhibit 1 concerning the Omnibus Crime Control and Safe Streets Act of 1968, but did not understand it to preclude him from possessing a rifle [Rep. Tr. pp. 90-92]; that he had been told by the San Diego police that he could not possess concealable weapons, but could own and possess rifles; that he had no college education and no training or education with regard to the law [Rep. Tr. pp. 92-95]; that after reading the certification paragraph in Exhibit 1 on the first occasion in which he purchased a firearm he thought the forms were thereafter the same and so he did not reread the form on the second, third and fourth transaction, and further stated that no salesman had ever told him to read the certification form [Rep. Tr. p. 96, line 6; p. 98, line 15]; that he bought the Remington shotgun to protect his livestock at his home in Jamul, which was in the mountains, and which livestock was menaced by marauding mountain lions and coyotes [Rep. Tr. pp. 99-101]; that he gave the 30 caliber carbine to a friend, one Vern Vogel for a Christmas present [Rep. Tr. p. 101]; that he gave the 30 Marlin rifle to one Joe Silvia, a friend and business associate, for a Christmas present

[Rep. Tr. p. 101]; that he gave the 30 caliber carbine to another friend, Bill Farley, for a birthday present [Rep. Tr. p. 102].

The defense then called an attorney, one Theodore Teacher, who testified [Rep. Tr. pp. 144-156] that he was an attorney and had represented defendant in a case in which the San Diego police had charged defendant with possessing a handgun which had been kept under a counter in a store in which the defendant worked; that he, Teacher, had informed the defendant that under State law he could possess rifles, but could not possess handguns; that he was present when a police officer of the San Diego Police Department also informed defendant that he could possess rifles, but not handguns.

The defense then called witness Joseph Silvia, who testified that the defendant had given him a 30-30 Marlin rifle for a present [Rep. Tr. pp. 156-163].

The defense then called witness Marilyn Silvia, who testified that she had helped the defendant shop for the firearm ultimately given to her husband by defendant as a present [Rep. Tr. pp. 163-166].

The defense then called witness William Farley, who testified that the defendant had given him a 30 caliber carbine for a birthday present [Rep. Tr. pp. 166-174].

The defense then called the witness Vern Vogel, who testified that the defendant had given him a 30 caliber carbine for a Christmas present [Rep. Tr. pp. 174-177].

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

Certiorari Should Be Granted Because This Honorable Court Has Already Granted a Writ of Certiorari in a Case Involving an Almost Identical Issue Raised in the Case at Bar, Said Issue Being Whether in a Firearms Criminal Prosecution Brought Pursuant to 18 U.S.C. 922 (a)(6), the Government Must Offer Proof That the Firearms Moved in Interstate Commerce.

An essential basic jurisdictional element involved in a charge made under 18 U.S.C. 922 is that the firearms purchased or procured be proved in some way to have moved in interstate commerce.

A reading of 18 U.S.C. 922 (a)(6) and 18 U.S.C. 922(h), when read together, makes clear that evidence of movement in interstate commerce is an essential element of proof.

18 U.S.C. 922 (a)(6) is as follows:

"§ 922. UNLAWFUL ACTS.

(a) It shall be unlawful—

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented indentification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other

disposition of such firearm or ammunition under the provisions of this chapter.

18 U.S.C. 922(h) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201 (v) of the Federal Food, Drug and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

It will be seen from a reading of the foregoing statutes that in order to violate 922(a)(6) a statement must be a material statement. The statement is made material by virtue of the provisions of 922(h). Section 922(h) clearly states that only the receipt of a firearm "which has been shipped or transported in interstate or foreign commerce" can be considered as within the purview of the statute.

Inasmuch as there was not one scintilla of evidence adduced with regard to the movement of the firearm

involved in interstate commerce, the conviction on count three must be reversed.

It is basic that United States District Courts are not courts of general jurisdiction, but are of limited jurisdiction. Without proof that the firearm involved herein was in some way connected with, or did move in interstate commerce, this Court is without jurisdiction.

At the conclusion of the taking of evidence, and after both sides had rested, defense counsel did, at pages 181-183 of the Reporter's Transcript, raise this point as part of his motion for judgment of acquittal. The Government, if it had been so inclined, could have moved to reopen its case for the purpose of offering evidence thereon, but elected not to do so.

An almost identical issue was presented in a case wherein this court has granted a Writ of Certiorari, that being the case of *United States v. Bass*, U.S. Sup. Ct. No. 70-71. The *United States v. Bass* case has been briefed, was argued on October 18, 1971, and is presently awaiting decision by this Honorable Court. The issue presented in *United States v. Bass* is:

> "Must Conviction of Previously Convicted Felon for Possession of Firearm in Violation of 18 U.S.C. APP. (sup V), §1202 (a), be Supported by Proof that Possession was in or Affecting Interstate Commerce?"

18 U.S.C. App. (sup. V) §1202 (a) is quite similar to 18 U.S.C. 922 (h) and is as follows:

"Any person who—

> '(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

'(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

'(4) having been a citizen of the United States has renounced his citizenship, or

'(5) being an alien is illegally or unlawfully in the United States,

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.'"

Additionally, it must be noted that the Ninth Circuit differs from the Second Circuit with regard to the requirement of proof of involvement of firearms in interstate commerce.

The Second Circuit in the case of *United States v. Bass*, 434 F.2d 1296 (1970) held that 18 U.S.C. (App.) §1202 (a) (1) (sup. V, 1970), did indeed require proof that the firearm was involved in interstate commerce. The Ninth Circuit Court of Appeals in the following cases held that the same statute did not require proof of involvement in interstate commerce.

United States v. Daniels, 431 F.2d 697 (9th Circuit, 1970);

United States v. Crow, 438 F.2d 766 (9th Circuit, 1971).

Inasmuch as the statute involved in the case at bar (18 U.S.C. 922 (a) (6) and 18 U.S.C. 922 (h)) raises

the self-same issue as that raised in the case of *United States v. Bass, supra*, it is felt that the same important Federal questions involving the commerce clause and Federal jurisdiction require that this Honorable Court grant Certiorari in the case at bar.

II.

Where a Trial Judge Deliberately Withholds Vital Information From Defense Counsel and Thereby Obtains Defense Counsel's Consent to Permit the Jury to Separate Overnight During Deliberations, Is Defense Counsel's Consent Thereby Obtained Vitiated and Is Petitioner Also Thereby Deprived of Effective Counsel in Violation of the Sixth Amendment of the United States Constitution.

In the instant case, the jury retired to deliberate after being instructed at approximately noon on February 17, 1971. By 6:00 P.M. of that date no verdict had been reached. The jury advised the Court that they could not reach an agreement and at that same time advised the Court further that they were "divided 10/2." The Court failed to inform counsel that the division was 10/2, although the Court did inform counsel that the jury expressed an inability to reach a verdict.

The Court stated at page 5 of the Reporter's Augmented Record of Proceedings, lines 13-21, as follows:

> "All right, ladies and gentlemen, I have your note which reads:
>
> "'I don't believe we will reach a verdict in this case.'
>
> "And I think you can. Maybe it's because you're tired, but what we'll do, pursuant to the agreement of the lawyers, is to permit you to go

home now and meet again at 9:30 in the jury room across the street. The courtroom is called, 'Courtroom 1A.'"

Nevertheless, at page 15 of the Reporter's Augmented Record of Proceedings, the Court stated as follows at lines 16-22:

"I should tell you gentlemen that the notes that I read you during the course of the jury's deliberations contained a sentence on two of them which I didn't read. The one that I received last night when the jury, in answer to my question whether the going home was agreeable to them they said in substance, that they were in agreement—the sentence reads: 'We are 10/2.'"

After a case has been submitted to the jury, ordinarily the jury is not permitted to separate. *Lucas v. U.S.*, 275 Fed. 405 (Cert. den.) 258 U.S. 620, 42 S. C. 272 (1922).

It has also been held that permitting a jury to separate and return to their homes overnight over the objections of counsel and after submission of a felony case, will vitiate entirely the verdict. *United States v. D'Antonio*, 342 F.2d 667 (7th Cir. 1965).

It will be seen at page 5 of the Augmented Record of Proceedings that defense counsel did agree to permit the jury to go home and separate overnight.

Under the circumstances it is felt that this agreement must be considered null and void because of the intentional withholding of pertinent and vital information from defense counsel by the trial judge.

It goes without saying that after a jury has retired to deliberate, any communication or contact with the jury is extremely sensitive.

Counsel was not required to agree to permit the jury to separate and had he been apprised of the knowledge that the jury stood 10/2, could have, and most likely would have, refused to permit the jury to separate.

Under the circumstances of a jury standing 10/2, it would have been in the best interests of the defendant to require the jury to continue to deliberate then and there and into the evening, in order to require either a resolution or a firm deadlock. Under the circumstances presented of a 10/2 jury, it was not in the best interests of the defendant to permit the jury to separate.

The conduct of the Court under the above set forth circumstances constitutes reversible error, for the reason that it constituted a release of the jury without the knowledgeable consent of defense counsel in violation of the holding of the *D'Antonio* case, *supra*, and further deprived the defendant-appellant herein of effective counsel in violation of the Sixth Amendment of the United States Constitution.

In its decision affirming the trial court's judgment of conviction on count three, the United States Court of Appeals for the Ninth Circuit stated as follows:

> "Moreover, we perceive no cogent reason why knowledge that there was a ten to two split in the jury on the evening of February 17, 1971 would have been of material assistance to counsel, in deciding whether to object to the separation of the jury for the night."

In so stating, the Ninth Circuit Court of Appeals has approved the trial judge's withholding of important information from the defense counsel.

Under this Court's revised rules, Rule 19(1)(e) this Court has stated that one of the considerations for granting Certiorari in a particular case will be whether the trial court

> "has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

It is most respectfully asserted that the deliberate withholding of any important information by a trial judge from a defense counsel does constitute a departure from the "accepted and usual course of judicial proceedings", and does require and necessitate this court's intervention so as to properly supervise and prevent such behavior from becoming accepted judicial procedure.

It is most respectfully asserted that it is unimportant whether defense counsel would have or could have utilized the information that the jury stood "ten/two". Perhaps defense counsel would have made the right decision and required the jury to further deliberate. On the other hand, it may be that defense counsel's action would not have resulted in any different outcome to the case. Nevertheless, the defense counsel, as a matter of basic fairness and honest judicial administration, should have been given the opportunity to at least know the true facts of the situation as it was presented to the trial judge.

A further important reason for granting Certiorari in the within case is that the Ninth Circuit Court of Appeals apparently disagrees with the Tenth Circuit on the issue as to whether the trial judge has the ex-

clusive right to decide whether to release a jury overnight during deliberations.

The Tenth Circuit in *United States v. D'Antonio,* 342 F.2d 667 (7th Circuit, 1965) held that a release of a jury overnight over defense counsel's objection constituted reversible error and vitiated the verdict. On the other hand, the Ninth Circuit in the case of *Sullivan v. United States,* 414 F.2d 714, 715 (9th Circuit, 1969) specifically disapproved the *D'Antonio* case, *supra.*

III.

The Giving of an "Allen" Type Instruction to the Jury by the Trial Judge Was Coercive of the Jury Per Se and Deprived Petitioner of a Fair Trial.

The evidence offered by the prosecution on each of the four counts involved in the within case was substantially similar. A reading of the testimony of the four major witnesses, the salesmen, indicated that the testimony given was basically that they sold a firearm to the defendant and that in so doing it was their usual practice to point out the certification paragraph in the "Firearms Transaction Record." In view of the substantial similarity of the evidence, it must be concluded that the result constitutes an inconsistent verdict. There is no rational basis for the jury's having found the defendant guilty on count three and acquitted on counts one and two, and become deadlocked on count four. Under the circumstances, the inescapable conclusion is that there was an irrational basis for the inconsistent verdict.

Many cases have held, and this writer will not assert that a simple inconsistency in the finding of a verdict by a jury constitutes ground for reversal.

The cases are numerous and will not be cited herein, all to the effect that an inconsistency in a jury's verdict on different counts of an indictment will not constitute grounds for reversal.

Nevertheless, in the case of *Manley v. United States*, 238 F. 2d 221 (6th Cir. 1956), the court did state that where an inconsistency appears, the court should be extremely careful to scrutinize the record for any prejudicial error. The court stated as follows at page 222:

> "Upon the entire record in the case, the acquittal on count four was inconsistent with conviction on counts two and three. This alone would not justify reversal. But, when an obviously inconsistent verdict as to different counts of an indictment or information is returned by the jury, both the trial court and the reviewing court should be extraordinarily careful to scrutinize the record for the ascertainment of any prejudicial error."

Defendant-appellant requests that this Court exercise that same degree of care and scrutiny in analyzing the record herein with regard to the Court's dealings with the jury during its deliberations.

It is, of course, basic that once a jury had retired to deliberate, any communication with that jury by the judge must be conducted with extreme sensitivity and caution. *Bollenbach v. U.S.*, 326 U.S. 607 at 611, 66 S. Ct. 402; *Powell v. U.S.*, 347 F. 2d 156 (9th Cir. 1965).

In the instant case, the jury retired to deliberate at approximately noon on February 17, 1971. By 6:00

P.M. of that date, no verdict had been reached [Rep. Augmented Record, p. 5].

The jury advised the Court that they could not reach an agreement, and at the same time advised that they were divided 10/2.

As stated above, the Court failed to inform counsel that the division was 10/2, although the Court did inform counsel that the jury expressed an inability to reach a verdict. The Court then permitted the jury to separate return to their homes with the order that they return the next morning at 9:00 A.M., which they did [Rep. Augmented Record, pp. 6-7].

At 10:30 A.M. on February 18, 1971, the jury sent another note to the judge, which read: "We can't reach a decision—" [Rep. Augmented Record, p. 7]. The judge then gave a so-called modified "Allen" instruction [see Appendix C] and further admonished the jury to deliberate further and "try harder" and, "if possible, to arrive at some unanimity" [Rep. Augmented Record, p. 8, lines 2-8]. Defense Counsel Objected [P. 9 Aug. Tr. lines 19-24] to the instruction.

At 11:30 A.M. the jury again sent a note to the judge requesting that the testimony of all four salesmen and the witness Teacher's testimony be reread [Rep. Augmented Record, p. 10].

The judge then responded by sending a note back to the jury advising them that it would take approximately an hour and forty-five minutes to reread the testimony, and requesting whether they had unanimously agreed on any count [Rep. Augmented Record, p. 11]. To this last communication defense counsel objected on the ground that it was inclined to perhaps be understood as being critical of the jury's inability to

agree on at least one or more counts. The objection was overruled [Rep. Augmented Record, p. 12, line 4].

The jury then returned to the courtroom and testimony was reread, which consumed some two hours. After rereading the testimony the Court inquired as to whether they had reached an agreement on any count, and the jury responded that they had reached a verdict of "not guilty" on count one [Rep. Augmented Record, p. 12].

The Court then sent the jury out again for further deliberations and for lunch.

Finally, at 4:40 P.M. in the afternoon, the jury returned and rendered a verdict on counts two, three and four, finding defendant not guilty on count two, guilty on count three and deadlocked on court four [Rep. Augmented Record, p. 14].

Considering the fact that the jury reported on at least three different occasions that they could not arrive at a verdict, beginning with the evening of February 17, 1971, and considering further that the Court required them to return and admonished them to "get a little unanimity," and considering further that the Court did not divulge the fact that the jury stood 10/2 to counsel; it is most respectfully asserted that the net effect of all of the foregoing factors combined to have the effect influencing and coercing the jury into believing that they were not meeting up to the expectations of the judge and that they should in fact be able to arrive at a verdict.

The result speaks for itself.

There were three remaining counts—counts two, three and four. On count two the jury found "not

guilty," on count three the jury found "guilty," and on count four the jury remained "hung."

It would appear, with all due respect to the Court, that the net effect of the handling of the jury and the instructions and colloquy with the jury was to unlawfully coerce a compromise verdict.

A "compromise" verdict is never a just verdict, it simply indicates a willingness by the jury to compromise honestly held convictions for the purpose of satisfying the judge that they are in fact doing their duty and have finally lived up to the judge's expectations that they would be able to arrive at a verdict.

The Ninth Circuit Court of Appeals in the cases of *Sullivan v. United States, supra, Dearinger v. United States,* 378 F.2d 346 (9th Circuit, 1967), and *Hudson v. United States,* 238 F.2d 167, has approved of the giving of the so-called "Allen" type instruction where a jury has stated it is deadlocked.

Nevertheless, three other circuits do not approve of the giving of the "Allen" instruction. The Third Circuit Court of Appeals disapproved of the giving of an "Allen-type" instruction in *United States v. Fioravanti,* 412 F.2d 407 (3rd CCA 1969). The Seventh Circuit Court of Appeals in *United States v. Brown,* 411 F.2d 930 (7th Circuit, 1969) disapproved of the giving of the "Allen" instruction. The most recent disapproval was given by the Court of Appeals for the District of Columbia in *Thomas v. U.S.* decided September 14, 1971, 9 Criminal Law Rptr. 2491.

It is most respectfully asserted the major vice of the so-called "Allen" instruction was best stated by the Third Circuit Court of Appeals in the *United States v.*

Fioravanti, supra, page 416, wherein the Court stated as follows:

> "To accept the validity of this reasoning is to assume an inherently faulty major premise: that the majority is right and has reached its preliminary inclination by appropriately inspired processes, and that the minority in a given group possesses attributes of spurious rationality. But good reason does not depend upon numbers. A quantity of like impressions does not endow a conglomerate with the hallmark of sound judgment. Indeed, as the history of this nation has witnessed, it is often a conscientious and determined minority which proves to be the safeguard against outrageous conduct wrought by tides and currents of public opinion."

The Ninth Circuit Court of Appeals at the conclusion of its decision affirming the judgment of conviction stated as follows (See Appendix A):

> "It is uncertain whether defendant complains of the modified 'Allen' instruction which was given, but in any event we hold that it was entirely compatible with the 'Allen' instruction approved by this Court in *United States v. Handy,* .... Fed 2d ..... (9th Circuit, October 20, 1971); *Sullivan v. United States,* 414 Fed 2d 714 (9th Circuit, 1969); and *Bearinger v. United States,* 378 Fed 2d 346 (9th Circuit, 1967)."

The Court's attention is most respectfully invited to the fact that specific objection was taken in the trial court to the modified "Allen" instruction given in the following language at page 9 of the augmented Reporter's Transcript, lines 19 through 24:

"Mr. Atkins: Your Honor, could I take an exception to that last instruction to the jury?

The Court: The very last or the total?

Mr. Atkins: The total.

The Court: Yes, you may, of course.

Mr. Atkins: Thank you, your Honor."

In addition, although the Ninth Circuit Court of Appeals apparently felt uncertainty with regard to that issue, the Ninth Circuit did decide the issue adversely to the petitioner.

It is most respectfully contended that the issue of the giving of the modified "Allen" instruction has been sufficiently raised and decided by the Ninth Circuit Court of Appeals to warrant consideration by this Honorable Court.

Conclusion.

It is most respectfully contended that for all of the above stated reasons the within petition for writ of certiorari should be granted and the decision reversed.

Respectfully submitted,

NORMAN R. ATKINS,
Attorney for Petitioner.

ATKINS & JACOBSON,
Of Counsel.

APPENDIX "A".

Opinion of the Court of Appeal for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Appellee, vs. Anthony D. Menna, Appellant. No. 71-2045.

[November 11, 1971].

Appeal from the United States District Court for the Southern District of California.

Before: HAMLEY, DUNIWAY and TRASK, Circuit Judges.

HAMLEY, Circuit Judge:

A federal grand jury indicted Anthony D. Menna on four counts charging, respectively, that on four occasions in 1969 and 1970, Menna acquired firearms by making false statements likely to deceive a licensed dealer, in violation of 18 U.S.C. § 922(a)(6). After a jury trial, Menna was found not guilty on counts one and two. The jury deadlocked on count four and that count was dismissed. He was convicted on count three and sentenced to a term of imprisonment of one year and one day. This appeal followed. In count three, the grand jury charged that, on December 19, 1969, in connection with the purchase of a Marlin .30-30 caliber rifle, serial number 69-6132Z, from a licensed dealer in firearms, Menna had willfully and knowingly made a false and fictitious statement, likely to deceive the dealer with respect to a material fact as to the lawfulness of the sale pursuant to Chapter 44, Title 18, United States Code. According to count three, this statement consisted of his certification on Form 4473, "Firearms Transaction Record," that he had not been

convicted of a crime punishable by imprisonment for a term exceeding one year, knowing in fact that he had been convicted of such a felony. It was established at the trial that, on June 14, 1961, Menna had been convicted in Ohio of burglary and malicious entry and that he had served a sentence of one year and six days at the Ohio Reformatory as a result of that conviction.

At the close of the evidence defendant moved, on various grounds, for judgment of acquittal. The motion was denied. On appeal, defendant renews two of the grounds urged in the district court for judgment of acquittal. The first of these is that there is no substantial evidence that defendant knowingly and willfully made the admittedly false statement on Form 4473.

In purchasing the rifle on December 19, 1969, Menna dealt with Timothy A. Payne, who was a salesman at a White Front store, a dealer licensed under 18 U.S.C. § 923. Payne testified that before selling the gun to Menna he pointed out, and asked defendant to read, the following paragraph in Form No. 4027:

> "I certify that: 1. I am neither under indictment for, nor have I been convicted of a crime punishable by imprisonment for a term exceeding one year. . . ."

Payne could not actually recall this particular transaction but based his statement as to how he had proceeded in reference to this sale on what he usually did in most instances of sales of firearms. Payne further stated that he did not recall having ever deviated from that practice.

Menna took the witness stand and denied that he had read the form and testified that, when he signed it, he was not in any way familiar with the quoted state-

ment contained therein. His explanation for not reading the form was that, on a prior occasion, while shopping for a rifle, he was asked to sign a certification (old Form No. 4727), which stated only ". . . I am not prohibited by Title 18 U.S.C. . . . from receiving a firearm." Defendant said he did not know whether the cited statute prohibited him from receiving a gun. He recalled, however, that earlier that year a lawyer and a police officer had informed him that he could receive rifles, but not hand guns, under state statute, his felony conviction notwithstanding. The attorney so testified at the trial.

On the basis of this advice, defendant testifed, he had concluded that no statute prohibited his receiving a rifle, and had signed old Form 4027. He assumed that the form handed to him by Payne at the time of the December 19, 1969 transaction was the same as the earlier form, and so signed it without reading it. However, Donald L. Grossmeyer, a special investigator for the Alcohol, Tobacco and Firearms Division, U.S. Treasury Department, who arrested Menna on July 24, 1970, testified that Menna told him immediately after the arrest that he had read Form 4473, but did not read anything in it that would stop him from buying the firearm.

Considering the evidence in the light most favorable to the Government (*Glasser v. United States*, 315 U.S. 60, 80 (1942)), and bearing in mind that it is the exclusive function of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts (*United States v. Nelson*, 419 F.2d 1237, 1241 (9th Cir. 1969)), we hold that the trial court did not err in rejecting this

ground for a judgment of acquittal. The jury was not compelled to accept defendant's testimony that he did not read Form 4473, and his explanation for such failure. *See Hiram v. United States*, 354 F.2d 4, 6 (9th Cir. 1965). In view of the evidence the jury could find, beyond a reasonable doubt, that defendant's attention was specifically called to the critical paragraph of that form, and could infer therefrom that defendant read it before signing the form.

Defendant also contends that the trial court should have granted the motion for judgment of acquittal because the Government failed to prove that the gun in question moved in interstate commerce. Defendant points out that 18 U.S.C. § 922(a)(6) makes it unlawful knowingly to make a false statement to a licensed dealer only with respect to a "material" fact. He argues that it is necessary to look to section 922(h) to see what facts are material, and this subsection makes it unlawful to receive a firearm under certain conditions, if it has been shipped or transported in interstate commerce.

The Government did not prove that the firearm in question was shipped or transported in interstate commerce. But this was not required. Section 922(h) is not involved in this prosecution. Under 18 U.S.C. §922(d)(1), it is unlawful for a licensed dealer to sell or otherwise dispose of any firearm to any person knowing or having reasonable cause to believe that such person has been convicted of a crime punishable by imprisonment for a term exceeding one year. There is no requirement that such firearm be one which has moved in interstate commerce. The fact of Menna's prior conviction was material in view of section 922(d)

(1). Congress intended to reach wholly intrastate transactions under the Firearms Act on the theory that such transactions affect interstate commerce. *See* section 901 of Public Law 90-351, U.S. Code Cong. and Adm. News, 90th Cong. 2d Sess., p. 270 (1968).

The jury retired to deliberate at approximately noon on February 17, 1971. No verdict had been reached by six p.m. The jury advised the court that they could not reach an agreement and that they were then "divided 10/2." The court then excused the jury for the night, and permitted the members to return to their homes. The court did not disclose to counsel, however, until the next day, that the jury was divided ten to two.

Defendant argues that it is impermissible to allow a jury to separate and return to their homes overnight over the objection of counsel, after submission of a felony case, and had counsel for defendant known of the ten to two split he would most likely have refused to permit the jury to separate.

In urging that such a jury may not be excused and allowed to return to their homes over the objection of defendant, counsel cites *United States v. D'Antonio*, 342 F.2d 667 (7th Cir. 1965). In *Sullivan v. United States*, 414 F.2d 714, 715 (9th Cir. 1969), we expressly disapproved this Seventh Circuit holding, indicating preference for the rule announced in *Hines v. United States*, 365 F.2d 649, 651 (10th Cir. 1966), that the trial court has full discretion in such matters. Moreover, we perceive no cogent reason why knowledge that there was a ten to two split in the jury on the evening of February 17, 1971 would have been of material assistance to counsel in deciding whether to object to the separation of the jury for the night.

Defendant argues that the verdict of guilty on count three is impermissibly inconsistent with the verdicts of acquittal on counts one and two. Without reaching the question of whether an inconsistency would have invalidated the conviction on count three, we hold that there was no inconsistency. Each of the counts involved different transactions and different witnesses.

Defendant complains of the colloquys the trial court had with members of the jury in open court concerning the jury's initial view that it could not reach a verdict. We have examined these instances and find that the court handled the problem in a discreet and judicious manner and that it is unlikely that defendant was prejudiced by what occurred. It is uncertain whether defendant complains of the modified "Allen" instruction which was given. But in any event we hold that it was entirely compatible with the "Allen" instructions approved by this court in *United States v. Handy*, ... F.2d ..... (9th Cir. Oct. 20, 1971); *Sullivan v. United States*, 414 F.2d 714 (9th Cir. 1969); and *Dearinger v. United States*, 378 F.2d 346 (9th Cir. 1967).

Affirmed.

APPENDIX "B".

Sixth Amendment to the United States Constitution.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

ARTICLE. I, Section 8, UNITED STATES CONSTITUTION

"Section 8. The Congress shall have Power to . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

APPENDIX "C".

"I'm sure you can all think of cases where juries deliberated much longer, but I'm going to ask you to try and try harder, because what we try, with our jury system in this country, is to, if possible, to arrive at some unanimity amongst the jurors, and I think the best advise I've ever read is contained in a Supreme Court Opinion which came down about a hundred years ago.

"I'm going to read to you a short paragraph from that famous opinion, and it says:

> 'While undoubtedly the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment if he finds a large majority of the jurors taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment, or that he should close his ears to the arguments of men who are equally honest and intelligent as himself.'

"That's what the Supreme Court wrote, and I add to that the following: Remember at all times that no juror is expected to yield a conscientious conviction he or she may have as to the weight or the facts of the evidence, but remember, also, that after full delibera-

tion and consideration of all the evidence it is your duty to agree upon a verdict if you can do so without violating your individual judgment and conscience.

"So I'm going to ask you to retire again and try ffard, and if you can't agree then we'll accept that determination. So would you go back now to your little nest across the street.

"Thank you." [Reporter's Augmented Record of Proceedings, pp. 8-9].

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No. 71-772

In the Supreme Court of the United States

OCTOBER TERM, 1971

ANTHONY D. MENNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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ANTHONY D. MENNA, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of California petitioner was convicted on one count of violating 18 U.S.C. 922(a)(6), by making a false statement as to his lack of a prior felony conviction to a licensed dealer in connection with the acquisition of a firearm. He was sentenced to imprisonment for one year and a day. The court of appeals affirmed (Pet. App. A).

Petitioner's principal contention in this Court is that he was entitled to an acquittal since the government introduced no proof that the weapon he purchased was in interstate commerce. Petitioner cites

United States v. *Bass*, No. 70-71, decided December 20, 1971, in which this Court held that 18 U.S.C. App. 1202(a) required proof that a felon's possession or receipt of a firearm was in or affected interstate commerce. He also contends that 18 U.S.C. 922(a)(6) must be read in the light of 18 U.S.C. 922(h) which prohibits *inter alia* previously convicted felons from receiving a firearm which has been shipped or transported in interstate commerce. Both Sections (1202(a) and 922(h)), petitioner argues, make it clear that his false statement was not "material" since there was no showing that the weapon in question was connected with interstate commerce.[1]

This contention is without substance. The prosecution here was not directed at petitioner's receipt of a weapon which moved in interstate commerce, but at his fraud in concealing a material fact. That petitioner's prior conviction was material is evident, as the court below ruled (Pet. App. A. 4-5), from the duties imposed upon the other participant involved in the sale. Thus, the licensed dealer here could not have sold or disposed of the weapon in question if he had known or had reasonable cause to believe petitioner was a convicted felon, irrespective of whether the firearm had moved in interstate commerce. 18 U.S.C. 922(d)(1). See *United States* v. *Trioli*, 308 F. Supp. 358 (D. Mass).

[1] Petitioner relied only on Section 922(h) before the court of appeals.

Petitioner also complains about the giving of a supplemental modified "Allen" instruction (set forth at Pet. App. C.) and the failure of the judge to inform counsel that the jury had stated it was divided 10–2 prior to allowing the jury to separate overnight. These contentions are answered in the opinion below (Pet. App. A. 5–6), on which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972